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KILO ASSET SDN BHD v. HEW TAI HONG

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
HASAN LAH FCJ
B MOHAMED APANDI ALI FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 02(f)-94-12-2014(A)]
23 NOVEMBER 2015

C ***COMPANY LAW:*** *Winding up – Filing of affidavit in reply – Whether filed within three days from date of service of affidavit in opposition – Application for extension of time – Whether time limit prescribed in r. 30(2) Companies (Winding-up) Rules 1972 mandatory in nature – Whether non-compliance caused substantial injustice – Whether court has discretion to cure non-compliance of r. 30(2) –*
D *Whether extension of time ought to be granted – Whether rr. 193 and 194 considered by trial court – Companies Act 1965, ss. 221(2) & 355(1)*

CIVIL PROCEDURE: *Affidavit – Filing and service – Winding up petition – Filing of affidavit in reply to affidavit in opposition – Application for extension of time – Whether affidavit filed within three days from date of service of affidavit in*
E *opposition – Whether time limit prescribed in r. 30(2) Companies (Winding-up) Rules 1972 mandatory in nature – Whether non-compliance caused substantial injustice – Whether court has discretion to cure non-compliance of r. 30(2) – Whether extension of time ought to be granted – Whether rr. 193 and 194 considered by trial court – Companies Act 1965, ss. 221(2) & 355(1)*

F ***CIVIL PROCEDURE:*** *Extension of time – Application for leave – Winding up petition – Filing of affidavit in reply to affidavit in opposition – Application for extension of time – Whether affidavit in reply filed within three days from date of service of affidavit in opposition – Whether time limit prescribed in r. 30(2) Companies (Winding-up) Rules 1972 mandatory in nature – Whether*
G *non-compliance caused substantial injustice – Whether court has discretion to cure non-compliance of r. 30(2) – Whether extension of time ought to be granted – Whether rr. 193 and 194 considered by trial court – Companies Act 1965, ss. 221(2) & 355(1)*

H ***WORDS & PHRASES:*** *'shall' – Companies (Winding-up) Rules 1972, r. 30(2) – Application for extension of time – Whether time limit prescribed in r. 30(2) mandatory in nature*

On 24 October 2012, the respondent ('petitioner') filed a winding-up petition under s. 218(1)(f) and (i) of the Companies Act 1965 ('CA65') together with
I an affidavit affirmed by the petitioner to wind-up the appellant ('company'). Pursuant thereto, the company filed two affidavits in opposition on

6 December 2012. The petitioner then filed a reply affidavit together with a second affidavit in reply on 7 January 2013. On 14 January 2013, the petitioner filed another affidavit. *Vide* encl. 17, the petitioner filed an application for leave for an extension of time to file and serve his affidavits in reply to the company's affidavits in opposition. In the alternative, the petitioner sought an order that the winding up petition be heard and tried *via* a full trial. However, issues arose in relation to the fact that the affidavits in reply were not filed within three days of the service of the two affidavits in opposition as required under r. 30(2) of the Companies (Winding-up) Rules 1972 ('WUR'). Further, it was submitted that r. 30(2) is mandatory in nature due to the word 'shall' and thus, the court had no power to extend or abridge time. Reliance was placed on the Court of Appeal's decision in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank* (*'Crocuses & Daffodils')* where the court in that case refused to admit the company's affidavits in opposition for non-compliance of the time requirement stipulated under r. 30(1) of the WUR. In the present case, the High Court found that there was non-compliance with r. 30(2) of the WUR and dismissed encl. 17 since, *inter alia,* the time limit prescribed under the said Rule was mandatory and the court had no discretion to extend or abridge time. In the circumstances, the trial court dismissed the winding-up petition. The petitioner's appeal to the Court of Appeal was allowed on the basis that the High Court failed to consider the effects of rr. 193 and 194 of the WUR. Hence, this appeal. The question of law which arose for consideration was whether a winding up court had discretion to accept an affidavit in reply to an affidavit in opposition to a petition which was filed more than three days of the date of service on the petitioner of the said affidavit in opposition, which was contrary to the provision under r. 30(2) of the WUR.

Held (dismissing appeal with costs)
Per Md Raus Sharif PCA delivering the judgment of the court:

(1) The powers of the court to extend or abridge time are not restricted by the words employed in r. 30(2) of the WUR. Rules 193 and 194 of the WUR, together with s. 221(2) of the CA65 gives the court power to exercise its discretion to abridge the time prescribed in r. 30(2). The (Winding-up) Rules have to be read harmoniously and the rigours of r. 30(2) must be tampered by rr. 193 and 194 of the WUR and s. 221(2) of the CA65. Further, s. 355(1) of the CA65 shows that technical non-compliance can only invalidate a proceeding under the Act if the court is of the view that substantial injustice has been or may be caused by such non-compliance and the injustice cannot be remedied by any court order. (paras 30 & 32)

(2) *Crocuses & Daffodils* did not touch on the discretionary powers of the court under rr. 193 and 194 of the WUR. Neither did it consider the discretionary powers of the court under s. 221(2)(b) of the CA65 which empowers the court to validate formal defects or irregularities. Thus, the

A reasoning in *Crocuses & Daffodils* was not the conclusive authority for holding that the court has no discretion to abridge the time prescribed under r. 30 of the WUR and the decision must be construed to apply only to the facts peculiar to that case. (paras 33 & 34)

(3) Equitable considerations invariably would come into play and it was not B advisable for the court to adopt such a rigid approach on non-compliance. There were circumstances showed by the petitioner that it had plausible reason to file the petition. Under the circumstances, it would not be right to adopt a purely mechanistic approach to the issue of time limits and completely ignore the discretion of the court in C extending the same under r 193 of the WUR. (para 37)

(4) The courts, when exercising its powers under rr. 193 and 194 of the WUR, must be wary of all the surrounding circumstances of each case and weigh the interest of both parties in accordance with the facts and circumstances of each case. In the instant case, there was no injustice, D let alone substantial injustice, caused by the defect or irregularity. Further, it had not been shown that the injustice, if any, could not be remedied by an order of the court. That being the case, the High Court erred as it ought to have exercised its powers under rr. 193 and 194 of the WUR in favour of the petitioner and allowed the affidavits to be used E in the hearing of the petition on merits. The irregularity did not cause any injustice to the company and the delay by the petitioner in filing the affidavits was inconsequential and could be safely condoned under rr. 193 and 194 of the WUR and ss. 221(2)(b) and 355 of the CA65. (para 38)

F **(5)** Notwithstanding the fact that the time limit provided in r. 30 of the WUR is expressed to be mandatory in terms, under rr. 193 and 194 of the WUR and ss. 221(2)(b) and 355 of the CA65, the court is empowered to abridge or extend time for the purpose of curing the non-compliance of provisions such as r. 30(2). As such, the question of law posed herein G was answered in the affirmative in that a court has the discretion to extend time or to cure the non-compliance of r. 30(2) of the WUR. (paras 39 & 40)

***Bahasa Malaysia** Headnotes*

H Pada 24 Oktober 2012, responden ('pempetisyen') telah memfailkan satu petisyen penggulungan di bawah s. 218(1)(f) dan (i) Akta Syarikat 1965 ('AS65') bersama-sama dengan afidavit yang diikrarkan oleh pempetisyen untuk menggulungkan perayu ('syarikat'). Syarikat pula memfailkan dua afidavit balasan pada 6 Disember 2012. Pempetisyen kemudian memfailkan afidavit jawapan bersama-sama dengan afidavit jawapan kedua pada 7 Januari I 2013. Pada 14 Januari 2013, pempetisyen memfailkan satu lagi afidavit. Melalui lampiran 17, pempetisyen memfailkan permohonan untuk kebenaran melanjutkan masa untuk memfailkan dan menyerahkan afidavit

jawapannya kepada afidavit balasan syarikat. Secara alternatif, pempetisyen juga memohon supaya petisyen penggulungan didengar dan diputuskan melalui perbicaraan penuh. Walau bagaimanapun, isu berkenaan fakta bahawa afidavit jawapan tidak difailkan dalam masa tiga hari dari penyerahan kedua-dua afidavit balasan seperti diperuntukkan di bawah k. 30(2) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('WUR') telah dibangkitkan. Dihujahkan juga bahawa k. 30(2) bersifat mandatori disebabkan perkataan 'shall' dan oleh itu, mahkamah tidak mempunyai kuasa melanjutkan atau memendekkan masa. Sandaran dibuat pada keputusan Mahkamah Rayuan dalam *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank* (*'Crocuses & Daffodils')* di mana mahkamah dalam kes tersebut tidak menerima masuk afidavit balasan syarikat disebabkan oleh ketidakpatuhan kehendak masa seperti diperuntukkan di bawah k. 30(1) WUR. Dalam kes di sini, Mahkamah Tinggi mendapati bahawa terdapat ketidakpatuhan k. 30(2) WUR dan menolak lampiran 17 memandangkan, antara lain, had masa yang dinyatakan di bawah Kaedah tersebut adalah mandatori dan mahkamah tidak mempuyai budi bicara untuk melanjutkan atau memendekkan masa. Dalam keadaan ini, mahkamah bicara menolak petisyen penggulungan pempetisyen. Rayuan pempetisyen ke Mahkamah Rayuan dibenarkan atas dasar bahawa Mahkamah Tinggi gagal mempertimbangkan peruntukan kk. 193 dan 194 WUR. Oleh itu, rayuan ini. Persoalan undang-undang yang dibangkitkan untuk pertimbangan adalah sama ada mahkamah penggulungan mempunyai budi bicara menerima afidavit jawapan kepada afidavit balasan petisyen yang difailkan lebih daripada tiga hari dari tarikh penyerahan afidavit balasan kepada pempetisyen, yang bertentangan dengan peruntukan k. 30(2) WUR.

Diputuskan (menolak rayuan dengan kos)
Oleh Md Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Kuasa mahkamah untuk melanjutkan atau memendekkan masa tidak dihalang oleh perkataan-perkataan yang dinyatakan dalam k. 30(2) WUR. Kaedah-kaedah 193 dan 194 WUR, bersama-sama dengan s. 221(2) AS65 memberi kuasa kepada mahkamah untuk melaksanakan budi bicaranya untuk melanjutkan masa di bawah k. 30(2). Kaedah-Kaedah (Penggulungan) hendaklah dibaca secara berharmoni dan keketatan k. 30(2) mesti diubah dengan kk. 193 dan 194 WUR dan s. 221(2) AS65. Tambahan, s. 355(1) AS65 memperuntukkan bahawa ketidakpatuhan teknikal hanya boleh membatalkan prosiding di bawah Akta jika mahkamah berpendapat bahawa ketidakadilan substansial telah berbangkit dari ketidakpatuhan sebegitu dan ketidakadilan tidak boleh diremedikan oleh sebarang perintah mahkamah.

(2) *Crocuses & Daffodils* tidak menyentuh mengenai kuasa budi bicara mahkamah di bawah kk. 193 dan 194 WUR. Kes tersebut juga tidak mempertimbangkan kuasa budi bicara mahkamah di bawah s. 221(2)(b) AS65 yang memberi kuasa kepada mahkamah untuk mengesahkan

kecacatan formal atau salah aturan. Oleh itu, penemuan dalam *Crocuses & Daffodils* bukanlah autoriti muktamad untuk memutuskan bahawa mahkamah tidak mempunyai budi bicara untuk melanjutkan masa yang dinyatakan di bawah k. 30 WUR dan keputusannya hanya terpakai kepada fakta yang khusus kepada kes tersebut.

(3) Pertimbangan ekuiti terpakai secara berkesan dan mahkamah digesa supaya tidak menggunakan pendekatan yang tegas bagi ketidakpatuhan. Pempetisyen telah menunjukkan keadaan-keadaan di mana terdapat alasan munasabah untuk memfailkan petisyen ini. Di dalam keadaan ini, penggunaan pendekatan mekanistik adalah tidak betul terhadap isu had masa dan mengabaikan budi bicara mahkamah untuk melanjutkan masa di bawah k. 193 WUR.

(4) Semasa melaksanakan budi bicaranya di bawah kk. 193 dan 194 WUR, mahkamah perlu berhati-hati dengan keadaan sekeliling setiap kes dan mempertimbangkan kepentingan kedua-dua pihak berikutan fakta dan keadaan setiap kes. Dalam kes ini, tiada ketidakadilan mahupun ketidakadilan substansial yang disebabkan oleh kecacatan atau salah aturan. Tambahan lagi, tidak ditunjukkan berlaku ketidakadilan yang, jika ada, tidak boleh diremedikan melalui perintah mahkamah. Dalam keadaan ini, Mahkamah Tinggi khilaf memandangkan ia sepatutnya melaksanakan kuasanya di bawah kk. 193 dan 194 WUR bagi pihak pempetisyen dan membenarkan afidavit-afidavit digunakan semasa pendengaran petisyen berdasarkan merit. Salah aturan yang berlaku tidak menyebabkan sebarang ketidakadilan kepada syarikat dan kelewatan pempetisyen untuk memfailkan afidavit-afidavit tidak memudaratkan dan boleh dibenarkan di bawah kk. 193 dan 194 WUR dan ss. 221(2)(b) dan 355 AS65.

(5) Walaupun fakta bahawa had masa yang diperuntukkan di bawah k. 30 WUR adalah mandatori, di bawah kk. 193 dan 194 WUR dan ss. 221(2)(b) dan 355 AS65, mahkamah mempunyai kuasa untuk memendekkan atau melanjutkan masa untuk memperbetulkan ketidakpatuhan peruntukan seperti k. 30(2). Oleh itu, persoalan undang-undang yang dikemukakan dijawab dalam bentuk afirmatif dalam erti kata mahkamah mempunyai budi bicara untuk melanjutkan masa atau memperbetulkan ketidakpatuhan k. 30(2) WUR.

Case(s) referred to:

Anvest Corporation Sdn Bhd v. Wong Siew Choong Sdn Bhd [2008] 3 CLJ 317 CA ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(not foll)***

Dataprep (Malaysia) Sdn Bhd v. Utas Lambang Sdn Bhd [2009] 7 CLJ 163 HC ***(refd)***

Delta Drive (M) Sdn Bhd v. Hong Leong Finance Bhd [2007] 4 CLJ 435 CA ***(refd)***

Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor [2001] 1 CLJ 844 HC ***(refd)***

*Unispan Formwork Sdn Bhd v. Kim Choy Tractor Works Sdn Bhd [2004] 4 CLJ 151 HC **(refd)***
*Tng Hock Siang v. Lady Bodyline Lingerie Sdn Bhd [2010] 1 LNS 1590 HC **(refd)***
*United Merchant Finance Bhd v. Magpie Resources Sdn Bhd [2001] 5 CLJ 464 HC **(refd)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), (f), (i), 221(2)(b), 355(1)
Companies (Winding-up) Rules 1972, rr. 30(1), (2), 193, 194(1)
Courts of Judicature Act 1964, s. 78(1)

For the appellant - Raam Kumaar (Maizatul Azlinda Dato' Mohd Ali with him); M/s KB Tan, Kumar & Partners
For the respondent - Ranjit Singh (Faizul Hilmy Ahmad Zambri, Nathan Subramaniam Eliatamby & Jeffrey Lee with him); M/s WY Chan & Roy

[Editor's note: For the Court of Appeal judgment, please see Hew Tai Hong v. Kilo Asset Sdn Bhd [2015] 1 LNS 13 (affirmed).]

Reported by Kumitha Abd Majid

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] This was an appeal by the appellant against the decision of the Court of Appeal which reversed the decision of the High Court dismissing the respondent's winding-up petition against the appellant and the respondent's application for an extension of time in encl. 17.

[2] Enclosure 17 arose from the winding up petition where the respondent, pursuant to r. 193 and r. 194 of the Companies (Winding-up) Rules 1972 (Winding-up Rules) applied for an extension of time to file and serve his affidavit in reply to the appellant's affidavits in opposition to the winding up petition and to file and serve other affidavits.

[3] In this appeal we will refer to the appellant as the company and the respondent as the petitioner.

[4] We heard the appeal on 9 July 2015 and dismissed the appeal with costs. We now give our reasons for doing so.

Background Facts

[5] Before we deal with the issue on appeal, we deem it appropriate to state in brief the facts which led to the present dispute. On 24 October 2012 the petitioner filed a winding up petition No: 28-77-10/2013 to wind up the company, together with an affidavit affirmed by the petitioner. Pursuant thereto, the company filed and served its affidavit in opposition.

[6] The winding up petition was filed under s. 218(1)(f) and (i) of the Companies Act 1965, on the grounds that (a) the directors had acted in the affairs of the company in their own interests rather that in the interests of the company as a whole which appeared to be unfair or unjust to other members ("unfair conduct" ground) and (b) it is just and equitable that the company be wound up ("just and equitable" ground).

[7] The winding up petition contained a detailed narration of the events leading to the dispute between the shareholders and the directors.

[8] The petitioner is a director and one of the shareholders of the company. The petitioner holds 75,000 shares representing 30% of the share capital. One Goh Cheng Kee is the majority shareholder holding 150,000 shares representing 60% of the share capital. The remaining 10% of the share capital comprising 25,000 shares belongs to one Mohd Mokhtar Ismail.

[9] The company is principally engaged in property development.

[10] The petitioner, who claimed to have thirty (30) years of experience in the construction and development industry, was persuaded by Goh Cheng Kee to join the company to develop a project known as "Baldwin Business Park" with Intervax Corporation Sdn Bhd as the landowner and the company as the developer. A joint venture contract was entered into by the company and Intervax Corporation Sdn Bhd on 14 April 2008 to develop the land in which the profit would be shared by the company and the latter on a 77% and 23% basis respectively.

[11] Pursuant to the said joint venture contract, a supplemental agreement was entered into on 12 July 2010 wherein a joint venture company was incorporated with the name Kilo Intervax Sdn Bhd. The company would be holding 77% of the paid up share capital and Intervax Corporation Sdn Bhd 23% of the paid up share capital of the joint venture company. However, for the shareholders of the company, the profits from the joint venture would be distributed according to the shareholding of the shareholders in the company.

[12] The petitioner claimed that there was an agreement between him and Goh Cheng Kee whereby he would always be entitled to permanent representation on the Board of Directors of the company and all business decisions would be taken on equal basis between the two.

[13] The dispute between these two shareholders was said to have been sparked when Goh Cheng Kee wanted to appoint an independent sales team for the project, a decision which was strongly opposed by the petitioner. The petitioner averred that besides incurring additional expenses to the company, the appointment of an independent sales team was not needed as the company already had its own sales team. Further, on 18 September 2012, a circular resolution was issued by Goh Cheng Kee which sought to change the company's mandate to the bank on signatories to cheques by naming himself as the sole signatory for the company's account with Hong Leong Bank

Berhad. On top of that, the petitioner also averred that business decisions of the company had been made by Goh Cheng Kee without even consulting him and thus worsened the relationship between them.

[14] Being aggrieved, the petitioner wrote a letter through his solicitors to Goh Cheng Kee setting out his grievances with an offer for the sale of his shares to Goh Cheng Kee at the price of RM3,200,000, or for the purchase of Goh Cheng Kee's shares at RM6,400,000. Goh Cheng Kee negotiated to purchase the petitioner's shares at RM2,029,335 for phase 2 and informed the petitioner that phase 1 profits would only be distributed after an audit was conducted on the profits of phase 1. From Goh Cheng Kee's conduct, the petitioner alleged that Goh Cheng Kee had refused to purchase his shares at the price offered or even sell his shares at the higher price as offered by the petitioner, which eventually led the petitioner to apply to have the company wound up.

[15] In his affidavit to oppose the petition, Goh Cheng Kee denied all the petitioner's allegations against him. According to him, there was no reason for him to sabotage their own company and he had no problems working with the petitioner. Goh Cheng Kee also denied having any agreement whatsoever with the petitioner on giving him permanent representation on the company's board. By filing this petition, according to Goh Cheng Kee, the petitioner was trying to force him to buy the petitioner's shares at the petitioner's price. Further, Goh Cheng Kee averred that the petitioner had no grounds whatsoever to wind up the company which was a healthy, profit-making company. Goh Cheng Kee's averments in his affidavit were supported by the affidavit affirmed by Mohd Mokhtar Ismail.

[16] In terms of the sequence of the affidavits filed, the affidavit in support of the petition was filed on 24 October 2010. Two affidavits in opposition (affirmed by Goh Cheng Kee and Mohd Mokhtar bin Ismail respectively and noted in the judgment of the High Court as Affidavit No. 1 and Affidavit No. 2), were filed on 6 December 2012. The petitioner then filed a reply affidavit together with a second affidavit in reply on 7 January 2013. On 14 January 2013, there was another affidavit filed on behalf of the petitioner (affidavit affirmed by Soh Siew Yeng).

[17] On the facts, it is evident that the three affidavits in reply were not filed within three days of the service of the two affidavits in opposition.

[18] On 8 February 2013, the petitioner filed the application in encl. 17 for leave for an extension of time to be given to the petitioner to file and serve his affidavits in reply to the company's affidavits in opposition. The petitioner in the alternative sought an order that the winding up petition be heard and tried *via* a full trial with leave to be given to the parties to cross-examine the deponents of the affidavits.

[19] On 8 April 2013, the High Court after hearing the parties, found that there was a non-compliance of r. 30(2) of the Winding-Up Rules and dismissed the petitioner's application in encl. 17 for an extension of time. The High Court gave the following reasons:

(a) compliance with the time limit prescribed under r. 30(2) of the Winding-Up Rules in relation to the filing and service of affidavit is mandatory;

(b) the court has no discretion to extend or abridge time under r. 30(2) of the Winding-up Rules;

(c) the reasons given for the delay that there was insufficient time to obtain evidence and to meet with the client were inadequate to enable the court to exercise its discretion to grant an extension of time;

(d) the extension of time would prejudice the company in that the company's accounts had been frozen since the advertisement of the winding up petition; and

(e) given that the court did not take into consideration the affidavits in reply, the issues arising from the available affidavits did not justify the cross-examination of the deponents.

[20] With the dismissal of encl. 17, the High Court having not accepted or considered the affidavits in reply, dismissed the winding up petition.

[21] Aggrieved with the decision of the High Court, the petitioner filed two appeals to the Court of Appeal. Appeal No: A-02(IM) 1230-05/2013, was in respect of the High Court's decision on encl. 17 while appeal No: A-02(IM) 1231-05/2013 was against the High Court's decision in dismissing the winding up petition.

[22] On 17 February 2014, the Court of Appeal unanimously allowed the petitioner's appeals and remitted the winding up petition back to the High Court for a full hearing. The reasons given by the Court of Appeal may be summarised as follows:

(a) The High Court failed to consider the effects of rr. 193 and 194 of the Winding-up Rules. The High Court should have considered the current approach to non-compliance with rules of procedure, namely, with regard to justice and not only to the technical non-compliance.

(b) Rule 194 of the Winding-up Rules provides that no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court was of the opinion that substantial injustice had been caused and that the injustice could not be remedied by any order of court. Rule 194 of the Winding-up Rules further provided that the court could on application extend time to do any act under the Rules.

(c) The High Court erred in failing to consider the fact that a s. 218(1)(f) and (i) petition under the Companies Act 1965 stood on a very different footing from that of a s. 218(1)(e) petition under the same Act, and that in an unfair prejudicial conduct case where equitable considerations are involved, it will not be possible or advisable for the court to adopt such a rigid approach on non-compliance.

[23] The company being aggrieved with the decision of the Court of Appeal, filed an application for leave to appeal to the Federal Court. On 24 November 2014 leave was granted to the company on a single question of law namely:

> Whether a Winding Up Court has the discretion to accept an affidavit in reply to an affidavit in opposition to a petition which is filed more than three (3) days of the date of service on the petitioner of the said affidavit in opposition, contrary to provision of Rule 30(2) of the Companies (Winding-Up) Rules 1972.

Findings

[24] This appeal pivoted on a question of law, namely whether or not the court retained the power or discretion to cure any non-compliance of r. 30(2) of the Winding-up Rules. In this regard, r. 30(2) provides:

> **30. Affidavits opposing the petition and affidavits in reply**
>
> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.
>
> (2) Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor.

[25] Learned counsel for the company submitted that r. 30(2) of the Winding-up Rules is mandatory in nature because of the word "shall" and as such the court has no power to extend or abridge time. Learned counsel placed heavy reliance on the Court of Appeal's decision in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485; [1997] 2 MLJ 756 *(Crocuses & Daffodils)* which is a leading authority on the interpretation of the similarly worded r. 30(1) of the Winding-up Rules. It is pertinent to note that the similarly worded r. 30(1) prescribes that "affidavits in opposition to a petition ... shall be filed and a copy thereof served on the petitioner or his solicitor at least seven (7) days before the time appointed for the hearing of the petition".

[26] In *Crocuses & Daffodils*, the respondent company failed to serve its affidavits in opposition on the petitioning bank in compliance with the time requirement stipulated under r. 30(1) of the Winding-up Rules. Upon the

petitioning bank's preliminary objection, the winding up court refused to admit the company's offending affidavits in opposition. The Court of Appeal upheld the decision of the High Court. In doing so, the Court of Appeal held at p. 491 (CLJ); p. 762 (MLJ) of the judgment as follows:

> By their words and expression, r. 30(1) is mandatory in nature and as such, the learned judge was correct when he refused to admit all four affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

[27] The decision and reasoning of the Court of Appeal in *Crocuses & Daffodils* was followed and adopted in number of cases. (see *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor* [2001] 1 CLJ 844; *United Merchant Finance Bhd v. Magpie Resources Sdn Bhd* [2001] 5 CLJ 464; *Unispan Formwork Sdn Bhd v. Kim Choy Tractor Works Sdn Bhd* [2004] 4 CLJ 151; *Dataprep (Malaysia) Sdn Bhd v. Utas Lambang Sdn Bhd* [2009] 7 CLJ 163; *Delta Drive (M) Sdn Bhd v. Hong Leong Finance Bhd* [2007] 4 CLJ 435; [2007] 5 AMR 93, *Anvest Corporation Sdn Bhd v. Wong Siew Choong Sdn Bhd* [2008] 3 CLJ 317; [2008] 3 MLJ 334).

[28] Learned counsel for the company submitted that we should endorse the decision of the Court of Appeal in *Crocuses & Daffodils* in view of its settled legal position. With respect, we are however not persuaded to do so.

[29] We are of the view that although the wordings of r. 30(2) of the Winding-up Rules seem to be mandatory in nature, one must not lose sight of the general powers of the court to abridge time as envisaged under rr. 193 and 194(1) of the same. Those rules which provide as follows:

> **193. Enlargement or abridgment of time**
>
> The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.
>
> **194. Formal defect not to invalidate proceedings**
>
> (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

Further, s. 221(2)(b) of the Companies Act 1965 is also a saving provision as it provides for the following:

> **Powers of Court on hearing petition**
>
> 221(1) On hearing a winding up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding up order on the ground only that the assets

of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

(2) **The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:**

(a) ...

(b) **dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;**

(emphasis added)

[30] Bearing the above provisions in mind, we find that the powers of the court to extend or abridge time are not restricted by the words employed in r. 30(2) of the Winding-up Rules. Rules 193 and 194 of the Winding-up Rules, together with s. 221(2) of the Companies Act 1965 clearly give the court power to exercise its discretion to abridge the time prescribed in r. 30(2). In our considered view, the Winding-up Rules have to be read harmoniously, and the rigours of r. 30(2) must be tampered by rr. 193 and 194 of the Winding-up Rules and s. 221(2) of the Companies Act 1965.

[31] As we have alluded to above, it is crystal clear from a bare reading of r. 194(1) of the Winding-up Rules that: "... no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion substantial injustice has been caused...and that the injustice cannot be remedied by any order of court". Rule 193 further provides that the court can on application extend time to do any act under the Winding-up Rules.

[32] Further, it is clear from s. 355(1) of the Companies Act 1965 that technical non-compliance can only invalidate a proceeding under the Act if the court is of the view that substantial injustice has been or may be caused by such non-compliance and the injustice cannot be remedied by any court order. Section 355(1) of the Companies Act 1965 provides that:

Irregularities in proceedings

355(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

[33] As for the reliance placed on the case of *Crocuses & Daffodils*, we note that the judgment in that case did not touch on the discretionary powers of the court under rr. 193 and 194 of the Winding-up Rules. Neither did it even consider the discretionary powers of the court under s. 221(2)(b) of the Companies Act 1965 which empowers the court to validate formal

A defects or irregularities. Thus, we are of the view that the reasoning of the Court of Appeal in *Crocuses & Daffodils* is not the conclusive authority for holding that the court has no discretion to abridge the time prescribed in r. 30 of the Winding-Up Rules.

[34] It follows therefore that the Court of Appeal's decision in *Crocuses &* B *Daffodils* must be construed to apply only to the facts peculiar to that case. The facts in *Crocuses & Daffodils* clearly showed that there was inordinate delay, with the court observing that the service of all the affidavits on the bank had clearly and blatantly contravened the mandatory time prescribed under r. 30(1) of the Winding-up Rules. This was also a case where the C petitioner had a judgment in hand obtained on 4 July 1991, where the original hearing date of the petition was 24 September 1992. It would therefore seem that there could be no excusable reason why the affidavits had to be filed out of time. The Court of Appeal in *Crocuses & Daffodils* in deciding as it did was also swayed by the fact that the company's indebtedness had D been established as long ago as 1984. The Court of Appeal emphasised that proceedings in the form of execution of judgment should never be allowed to drag and more so where such proceedings concerned the compulsory winding up of a company.

[35] With the above in mind, with respect, we find that learned counsel for E the company's reliance on the case of *Crocuses & Daffodils* is misplaced. In our considered view, courts are not restricted by that case in exercising its powers under rr. 193 and 194 of the Winding-up Rules. Had it been intended that they should not be applied to r. 30, the former would have said so in very clear terms.

F **[36]** In this regard, we share the sentiments expressed by Mohamad Arif Yusof J (as he then was) in the case of *Tng Hock Siang v. Lady Bodyline Lingerie Sdn Bhd* [2010] 1 LNS 1590 where His Lordship held that "it would have been unduly strict and mechanistic to insist on a rigid adherence on r. 30(1), while ignoring rr. 193 and 194 of the Winding-up Rules."

G **[37]** In the circumstances, we agree with the finding of the Court of Appeal in the instant case in that the Judicial Commissioner was in error when he failed to direct his mind to the facts of this case where equitable considerations invariably would come into play and it was not advisable for the court to adopt such a rigid approach on non-compliance. On the facts, H we are of the view that there were circumstances shown by the petitioner that it had plausible reason to file the petition. Under the circumstances, we find that it would not be right to adopt a purely mechanistic approach to the issue of time limits, and completely ignore the discretion of the court in extending the same under r. 193 of the Winding-up Rules.

I **[38]** We are of the unanimous opinion that courts when exercising its powers under r. 193 and r. 194 of the Winding-up Rules must be wary of all the surrounding circumstances of each case. In exercising such discretion,

courts must weigh the interest of both parties in accordance with the facts and circumstances of the each case. In the instant case, having considered the facts and circumstances, we find that no injustice, let alone substantial injustice, had been caused by the defect or irregularity. Further, it had not been shown to us that the injustice, if any, cannot be remedied by an order of the court. That being the case, in our considered view the High Court erred as it ought to have exercised its powers under rr. 193 and 194 of the Winding-up Rules in favour of the petitioner and allowed the affidavits to be used in the hearing of the petition on merits. In this case, we find that the irregularity did not cause any injustice to the company, and the delay by the petitioner in filing the affidavits was inconsequential and could be safely condoned under rr. 193 and 194 of the Winding-up Rules and s. 221(2)(b) and s. 355 of the Companies Act 1965.

Conclusion

[39] In the final analysis, notwithstanding the fact that the time limit in r. 30 of the Winding-up Rules is expressed to be mandatory in terms, in our judgment we find that under rr. 193 and 194 of the Winding-up Rules and ss. 221(2)(b) and 355 of the Companies Act 1965, the court is empowered to abridge or extend time for the purpose of curing non-compliance of provisions such as r. 30(2).

[40] For the aforesaid reasons, we answer the question of law posed in the affirmative, in that a court has the discretion to extend time or to cure the non-compliance of r. 30(2) of the Winding-up Rules. For the above reasons the appellant's appeal was dismissed with costs.

[41] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brother Justice Apandi Hj Ali, FCJ has since resigned to assume the post of the Attorney-General of Malaysia.